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MEMORANDUM OF LAW

DATE: May 28, 1993

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Paraiso Cumbres Property

On March 30, 1993, after hearing public testimony, the City Council adopted the Rancho Penasquitos Community Plan and the associated amendments to the Progress Guide and General Plan. However, when the community plan was adopted, the land use designation for the approximately 232-acre "Paraiso Cumbres" property remained unresolved. The City Council requested that the Planning Department return in 60 days with additional information regarding the Paraiso Cumbres property. This memorandum of law discusses the legal issues concerning the land use designation of the Paraiso Cumbres property and some of the legal issues raised by the owners of the property.

I BACKGROUND

The Rancho Penasquitos Community Plan is a revision of the Penasquitos East Community Plan adopted by the City Council on October 17, 1978. When the Penasquitos East Community Plan was adopted in 1978 a portion of the Paraiso Cumbres property was designated for low density residential development and the remainder was designated as open space. This provided for the possible development of approximately 400 dwelling units on the Paraiso Cumbres property. However, the site was, and has remained, zoned A-1-10. This allows SoPac, as a matter of right, to develop one residential dwelling unit per ten acres, i.e., 23 units.

In 1987 the Planning Department initiated an update to the Penasquitos East Community Plan ("Draft Update"). The Draft Update designates a somewhat larger portion of the Paraiso Cumbres property for open space (197 acres) and the remainder for low density residential (35 acres).

The Draft Update was distributed for public review in July

1988 and again in July 1991. In December 1992 and January 1993, public hearings were held before the Planning Commission to discuss the Draft Update. The Rancho Penasquitos Community Planning Board also reviewed the Draft Update. Both the Planning Commission and the Community Planning Board recommended that the Draft Update be amended to provide that all of the Paraiso Cumbres property be designated as open space and that the existing A-1-10 zoning be retained.

The Paraiso Cumbres property is owned by the SoPac Real Estate Group ("SoPac"). In October 1991 SoPac submitted its application for a number of entitlements for the development of the Paraiso Cumbres property which included a tentative map, a resource protection permit, and a rezone. In December of 1991, SoPac's application was found complete by the Planning Department. The tentative map, resource protection permit and proposed rezone are still pending and have not yet been considered by the City Council.

SoPac in its letters to the Mayor and the City Council, dated March 1, 1993, and March 29, 1993, (copies attached as Attachments 1 and 2) raises a number of legal issues concerning the designation of all of its property as open space. These can be divided into several broad categories. First, SoPac contends that the designation of all of its property as open space on the Draft Update would strip the property of all of its "economically beneficial or productive use." Second, SoPac alleges that the City is "spot planning" by treating SoPac differently than its neighbor. Third, SoPac contends that the zone of A-1-10 is inconsistent with the Penasquitos East Community Plan and that SoPac is entitled to process its map in accordance with the General Plan as of December 1991, when its application was deemed complete.

II ANALYSIS

A. Inverse Condemnation

Under the Fifth and Fourteenth Amendments to the United States Constitution, private property may not be "taken" by the government for public use without payment of just compensation. The United States Supreme Court in Pennsylvania Coal Co. v, Mahon, 260 U.S. 393, 415, 43 S.Ct., 158, 67 L.Ed. 322 (1922), held that if a land use regulation "goes too far" (deprives an owner of possessory interest in his property) it will be recognized as a "taking." This is commonly referred to as "inverse condemnation." In 1987, the United States Supreme Court in First English Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 96 L.Ed. 2d 250, 107 S.Ct. 2378 (1987), held that property owners may be compensated when a land use

regulation is found to have gone "too far."

SoPac alleges that if all of its property is designated as open space on the Rancho Penasquitos Community Plan, SoPac could build only 23 homes on 234 acres. SoPac contends that from a practical standpoint this would not be economically feasible and that they would loose all economic use of its land. SoPac states that "prior to the design costs, prior to any costs incurred because of conditions on the development, and not including the costs of the land . . . the cost to make surface improvements, put in the sewer, water and storm drain improvements, provide the common landscape and irrigation and grade the property, totals a minimum of $7,870,000 or in excess of $342,000 per lot." (Attachment 1.)

In the past, courts have been extremely deferential to the government's ability to impose land use regulations. However, many legal scholars believe that the recently decided case of Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 120 L.Ed. 2d 798 (1992), will have a significant impact on land use regulation. ("After Lucas: Land Use Regulation and the Taking of Property Without Compensation," David L. Callies, Editor, Section of Urban, State, and Local Government Law, American Bar Association 1993.)

Lucas owned two undeveloped beachfront lots in South Carolina. He had intended to construct a single family home on each of the lots. Two years after he purchased his two lots, South Carolina enacted legislation which prohibited construction of any habitable structure beyond a certain setback line. Lucas's entire property fell within the setback line prohibiting any structures from being built on his property.

The United States Supreme Court in Lucas held that the government must compensate property owners if governmental regulatory action, regardless of any legitimate public purpose it may serve, eliminates all economic beneficial and productive use of private property.

The primary focus of the Court was whether the regulation deprived Lucas of "all economical beneficial use" of his land. The Court also noted that the formula for determining whether all economic beneficial use has been taken away is ambiguous. The Court states in a footnote:

> "Regrettably . . . our 'deprivation of all economically feasible use' rule is greater than its precision . . .. If a regulation requires that 90 percent of a developer's property be left in its natural, undeveloped state, the outcome of a takings inquiry will depend on whether the denominator of the deprivation formula is the burdened

portion of the tract or the tract as a whole."
Id. at 813, n7.

Moreover, the Court in Lucas shifted the burden to the government to justify its land use regulation once the property owner has shown that the regulation has denied him of all beneficial economic use of his property. Id. at 832.

The Court emphasized that claims for compensation are more likely to be appropriate when the government fails to treat similarly situated landowners in the same manner. Id. 822.

As the result of Lucas, land use regulations will probably be more closely analyzed by the courts for their economic impact on property owners. It is impossible to predict whether a court, considering the economic realities of SoPac's situation, would determine that the large costs associated with developing the Paraiso Cumbres property would essentially make development under the total open space designation economically infeasible. In addition, SoPac is contending that it is being treated differently than the adjacent property owner known as "Montana Mirada."

As an example of current judicial thinking, in the recent case of Hensler v. City of Glendale, 13 Cal. App. 4th 15, 19 (1993), the court considered a claim for inverse condemnation based upon Glendale's enactment of an ordinance precluding the development of the ridge line areas of a 300-acre parcel. The effect of the ordinance was to preclude development on approximately 40 percent of the property. While the court stated: "Although Hensler's complaint raises a claim of a serious impairment of a constitutional right," the court determined that even constitutional rights are subject to reasonable statutory periods of limitation and concluded that the plaintiff's action was bared by the statute of limitations. In the Paraiso Cumbres fact situation, as you know, the Planning Department's proposal is that 197 acres of the 232-acre parcel be designated open space with the remaining 35 acres to be developable under certain conditions. The concept of designating the total parcel as open space would certainly raise the constitutional issue of a taking.

We therefore advise that the City of San Diego take a conservative approach when enacting any legislation that may have a significant economic impact on private property interests. In the present case, in order to minimize the City's exposure to damage awards and to prevent litigation in an unpredictable area of the law, we would advise that City Council adopt the Planning Department's recommendation to designate a portion of the Paraiso

Cumbres property as low density residential and the remaining portion as open space.

However, Lucas does not suggest that local governments can no longer enact zoning or other land use regulations. The court in Lucas noted that the state's property laws will still be used as guidance in determining whether a particular interest in land will be protected. Id. at 814, n7.

If the City Council chooses to designate all of the Paraiso Cumbres property as open space, we could argue that SoPac did not have a legitimate expectation to develop its property based upon the property's designation under the Penasquitos East Community Plan.

In the past, the courts believed that a property owner did not have a legitimate expectation to develop his or her land in accordance with a general plan designation. Furey v. City of Sacramento, 592 F.Supp. 463 (1984). See also Long Beach Equities, Inc. v. County of Ventura, 231 Cal. App. 3d 1016, 1040 (1991). (It is merely speculation that a particular project may be available to a property owner under the County of Ventura's General Plan.)

In Furey the United District Court held that the property owner was not entitled to rely on the general plan. The court determined that the property owner chose to play the "the zoning game." Fury, 592 F.Supp. 471 (1984). Furey purchased property in hopes of realizing a substantial increase in the value of the property by obtaining a favorable exercise of the city's rezoning authority. However, all the city did by designating Furey's land as open space on its general plan was to indicate that such a rezoning would not be approved. Id. at 472.

Moreover, a number of cases have held that designating private property for a potential public use on a general plan does not amount to a "taking."

In Selby Realty Company v. City of San Buenaventura, 10 Cal. 3d 110 (1973), the County of Ventura adopted its general plan which contained a circulation element that showed a proposed public street on a portion of Selby's property. The court held that the city's adoption of the general plan did not constitute a "taking."

The court reasoned that the adoption of a general plan is a legislative act and by its nature tentative and subject to change. If a governmental entity was subject to a claim of inverse condemnation merely because a parcel of land was designated for potential public use on a long range plan, ". . . the process of community planning would either grind to a halt or

deteriorate . . .." Id. 120. See also Rancho La Costa v. County of San Diego, 111 Cal. App. 3d 54, 61 (1980). (No taking occurred when a long range plan, which designated a developer's property as a public park, was adopted by the County of San Diego.)

Arguably, the City's designation of all of SoPac's property as open space on the Rancho Penasquitos Community Plan would not result in a "taking." In addition, SoPac could not reasonably rely on the City's past designation of its land on the Penasquitos East Community Plan for allowing it to develop its land for low density residential use.

However, as noted above, it is our opinion, after weighing the risk and benefits of designating all of the Paraiso Cumbres property as open space, that the risk of protracted litigation and the possibility of costly inverse condemnation damage awards outweighs the benefit the City would receive from designating an additional 35 acres of the Pariso Cumbres property as open space. Especially given the fact that SoPac would still be required to obtain a planned residential development permit and subdivision approvals from the City which would control the impact SoPac's project has on the surrounding open space. In addition, if SoPac was to build 23 units on its property, the approximately 35 acres now shown for low density residential use would still be built upon. The lesser number of units would arguably be the only "public benefit" resulting from the total open space designation.

B. Spot Zoning.

SoPac contends that the City is "spot planning" by treating SoPac differently than its neighbor Montana Mirador. The Planning Department's Report, dated May 25, 1993, states that the adjacent 635-acre site immediately to the south of the Paraiso Cumbres property (Montana Mirador) has many of the same physical characteristics but is designated for 575 residential units. It is our understanding from talking with the Planning Department staff that the other adjacent properties are composed of smaller parcels which have varying degrees of open space designation.

Spot zoning refers to the downzoning of a small parcel of land to a more restrictive classification than that imposed on surrounding property. 1 Cal. App. 4th at 641. In spot zoning cases the courts often focus on the size of the property affected by the zoning regulation to determine whether or not an "island of regulation" has been created. The larger the property the more difficult it would be to sustain an allegation of spot zoning. Viso v. State of California, 92 Cal. App. 3d 15, 22 (1979).

For example, the court in Friel v. Los Angeles, 172 Cal.

App. 2d 142 (1959), determined that an area 16 blocks long and over two double blocks wide, where 960 families resided, was too large to constitute an island for purposes of spot zoning.

The courts will also look at the compatibility of the spot zone with the surrounding uses. The court in Dale v. City of Mountain View, 55 Cal. App. 3d 101 (1976) held that a golf course did not suffer from "spot planning" because the surrounding residential uses did not interfere with the use of Dale's property.

In Dale, a golf course owner applied for a zone change from an agricultural use to a residential use. Shortly after the property owner submitted his application for a rezone, the city adopted a resolution for a general plan amendment to designate all of the golf course as a "recreational and visual" use. This action was upheld by the court.

The rationale of preventing islands of dissimilar use, does not seem to be applicable to large parcels of undeveloped land. Moreover, even if all of SoPac's property was designated as open space on the Rancho Penasquitos Community Plan, it would be difficult to find that this use is dissimilar or incompatible to the uses of the surrounding property. Particularly since approximately 450 acres of Montana Mirador's property is also designated as open space. (Rancho Penasquitos Community Plan, page 67.) Finally, the Planning Report states that the Paraiso Cumbres property is characterized by steep slopes and sensitive biology. This would support the City treating the Pariso Cumbres property differently than the adjacent property.

C. Consistency Doctrine.

SoPac contends that the present zoning regulation of A-1-10 is inconsistent with the designation of its property under the Community Plan. (It is not clear whether SoPac contends that the A-1-10 zone is inconsistent with the designation recommended by the Planning Commission or the current designation.) Moreover, SoPac states that the City is required to "upzone" the Paraiso Cumbres property to conform with SoPac's tentative map application. For purposes of discussion, we will assume that the designation of A-1-10 is inconsistent with the Community Plan.F

From discussions we have had with the Planning Department staff, they indicate that the A-1-10 zone is not inconsistent with the land use designation of the Paraiso Cumbres property as either all open space or as a mixture of low density residential and open space. Section 101.0404 of the San Diego Municipal Code states that the purpose of the A-1-10 zone is to provide the appropriate zoning for areas that are presently in agricultural or open space

use or which are undeveloped and will be developed later.

1) Consistency Doctrine as Applied to Zoning Ordinances.

California Government Code section 65300 mandates that all cities and counties adopt an adequate general plan. In addition, Government Code section 65860 provides that all zoning ordinances be consistent with the general plan. However, charter cities, except for Los Angeles, are exempt from this consistency requirement. Government Code section 65803.

The court in Mira Dev. Corp. v. City of San Diego, 205 Cal. App. 3d 1201 (1988) held that the City of San Diego was not required to follow the consistency mandate because the City of San Diego did not adopt the consistency requirement by its charter or ordinance. However, the court noted that it would examine the general plan to determine whether a zoning action is an abuse of discretion. See also City of Del Mar v. City of San Diego, 133 Cal. App. 3d 401 (1982).

2) Consistency Doctrine as Applied to Subdivision Maps.

Government Code sections 66573.5 and 66474(a) and (b) provide that no local agency shall approve a subdivision map unless the legislative body finds that the proposed subdivision is consistent with the General Plan. Consistency is determined on the date of tentative map approval. Youngblood v. Board of Supervisors, 22 Cal. 3d 150 (1978). In addition, in Haroman Co. v. Town of Tiburon, 235 Cal. App. 3d 388 (1991) the court held that an application for a tentative subdivision map filed during the revision of a city's general plan should be evaluated against the draft general plan under consideration rather than under the existing general plan.

Therefore, the Paraiso Cumbres subdivision map should be evaluated against the City's General Plan and the Rancho Penasquitos Community Plan in effect at the date of the tentative map approval.

III CONCLUSION

We advise that City Council adopt the Planning Department's recommendation and designate a portion of the Paraiso Cumbres property as low density residential and the remaining portion as open space. Given the current judicial climate, any legislation that may have a significant adverse economic impact on private property interests should be closely scrutinized in order to minimize the City's risk of protracted litigation and costly inverse condemnation damage awards.

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Attachments 2

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